UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN FEDERATION FOR CHILDREN, INC.,

and **Case: 28-CA-246878**

SARAH RAYBON, an Individual.

RESPONDENT'S REPLY TO THE ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGEMENT

Pursuant to Section 102.24(c) of the Rules and Regulations of the National Labor Relations Board ("the Board"), American Federation for Children, Inc. ("AFC" or the "Respondent"), by and through its undersigned counsel, hereby files this Reply to The Acting General Counsel's Opposition to Respondent's Motion to Dismiss the Consolidated Complaint or in the Alternative Motion for Summary Judgement (the "Opposition").

I. SUMMARY

The Acting General Counsel's Opposition vaguely describes conclusionary allegations against the Respondent then asserts the parties disagree on a material question because the Respondent has filed an Answer. To adopt the Acting General Counsel's position effectively renders the Board's Rules concerning summary judgments meaningless.

The Opposition does not address the central core of Respondent's Motion to Dismiss or in the Alternative for Summary Judgement ("Motion") – i.e., even if the allegations in the Consolidated Complaint are ***true***, several of the alleged violations against the Respondent still should be dismissed as a matter of law.

First, while the Complaint alleges Respondent's 2019 Employment Handbook policies were overbroad, those policies have since been amended. Because none of the other allegations are even remotely tied to the 2019 policies, this issue is moot. Further, the Complaint alleges the

Complainant, Sarah Raybon, "expressed concern" about a "discriminatory viewpoint." Even if true, as previously submitted, this ***is not*** protected concerted activity as a matter of law. If there was no concerted activity, then logically there can be no retaliation for that activity. The Acting General Counsel has failed to even dispute these legal arguments which rely on uncontested facts. Respondent respectfully submits that those arguments not addressed by the Acting General Counsel have been conceded, and the Board should find in Respondent's favor on each uncontested issue.

II. ARGUMENT

A. Procedural Objections

On an initial matter, the Acting General Counsel challenges a technical flaw in how Respondent's Motion was filed. If such an error occurred, it was a harmless technical error still in conformance with the Board's Rules and Regulations. When providing filing instructions, those Rules and Regulations state:

> Unless otherwise permitted under this section, all documents filed in cases before the Agency must be filed electronically ("E-Filed") on the Agency's website (www.nlrb.gov) by following the instructions on the website. … Notwithstanding any other provision in these Rules, if a document is filed electronically the filer need not also file a hard copy of the document, and only one copy of a document filed in hard copy should be filed.

§102.5(c). Notably, "Agency" is not a defined term in §102.1 of the Rules and Regulations but is used in context to describe the National Labor Relations Board.

Read plainly, §102.5(c) requires all documents to be "E-Filed" unless the filer wishes to make use of an exception, then states, ***notwithstanding*** any other rule, no other hard copy must be filed. Indisputably, Respondent's Motion was E-Filed on February 1, 2021, thirty days before the scheduled hearing date and was immediately posted on the docket for this matter. The Acting

General Counsel submits this filing was done while Respondent selected "Division of Judges" on the electronic submission rather than the option for the Board itself.[1] Neither the docket nor electronic receipt for the filing reflect this mistake but counsel for the Respondent acknowledges such a technical error could have occurred.

However, the Acting General Counsel received both a hardcopy of Respondent's Motion and a courtesy electronic copy on February 2, 2021. While the Respondent could have cured any procedural objections to a technical mistake within the time allowed to file with the Board, the Acting General Counsel's Opposition was the first time this objection was made. This conduct is consistent with the apparent intention of the procedural objection – i.e., not to assert disadvantage or harm, but rather to use a keystroke/data entry error as a means to avoid the issues raised in the Motion. Respondent submits any technical error in E-Filing its Motion was harmless and the Motion should be decided on the merits.

B. Standard of Evidence

The Acting General Counsel correctly submits Respondent's Motion must be supported by ***admissible*** evidence. CGC Opp. p. 4. However, the Opposition errs in conflating ***admissible*** evidence with ***admitted*** evidence. Vaguely opposing any use of sworn affidavits or documents because they are out of court statements is absurd on its face. Such interpretation of the Federal Rules of Civil Procedure would invalidate any pre-trial motion for summary judgement across all federal courts.

In support of its argument, the Acting General Counsel cites to *Lake Charles Mem'l Hosp.*, 240 NLRB 1330 (1979), which in turn cites to Rule 56 of the Federal Rules of Civil Procedure. Under the applicable federal rules, in general "***inadmissible*** hearsay cannot be

[1] The two filing options are listed directly next to one another on the online submission portal.

considered on a motion for summary judgment." *Macuba v. Deboer*, 193 F.3d 1316, 1322 (11th Cir. 1999) (quotation and footnote omitted) (emphasis added). Nonetheless, a hearsay statement may be still considered "in passing on a motion for summary judgment if the statement could be reduced to admissible evidence at trial." *Id*. at 1323 (quotation omitted). "The most obvious way to reduce hearsay to admissible form is to call the declarant to testify at trial." *Id*. Clearly, the Respondent witnesses' out of court statements can also be made at hearing if necessary. Similarly, the use of documents in motions for summary judgements is such a basic feature of these motions a response to this objection is unwarranted.[2]

To further illustrate the baseless nature of this argument, adopting the Acting General Counsel's interpretation would result in the entire Complaint against the Respondent being dismissed. Other than its conclusionary statements, the Consolidated Complaint is only supported by hearsay and documents not admitted into evidence. The alleged statements presented in the Consolidated Complaint are almost entirely the result of double or triple hearsay statements. For example, the Acting General Counsel's only support for its allegations of discriminatory handbook policies is Respondent's previous employment handbook. Cons. Compl. ¶4. According to the Acting General Counsel, this is inadmissible hearsay as it is an out of court document used to prove the truth asserted – i.e., the policies described in the handbook were in fact the policies of AFC at that time. Fortunately, this is not the standard of evidence dispositive motions are decided on under the Federal Rules. *Graves v. Lioi*, 930 F.3d 307, 326 (4th Cir. 2019), cert. denied sub

[2] Current counsel for the Acting General Counsel is aware of this practice given counsel's reliance on out of court documents such as a "copy of the Tally of Ballots" in a Motion for Summary Judgement filed to this Board just a month ago on an unrelated case. *See* Case 28-CA-269957 AGC. Mot. Sum. Judg. p. 2.

nom. *Robinson v. Lioi*, 140 S. Ct. 1118 (2020) (relying on hearsay evidence in an affidavit when granting a summary judgement motion because of its possible non-hearsay use).

Like the evidence the Acting General Counsel now objects to in its Opposition, if moved into evidence the handbook would be subject to hearsay exceptions or could have non-hearsay use under Fed. R. Evid. 801(c), (d)(2); 803(6). Regardless, as described below, Respondent's Motion should be granted considering only the allegations in the Consolidated Complaint.

C. Reliance on the Initial Pleading Requires an Adequate Pleading

The Acting General Counsel submits that because the Respondent has denied the allegations in the Consolidated Complaint, this necessarily means there is a genuine issue for hearing for all the allegations. AGC Opp'n p. 6 (citing *Kiro, Inc.*, 311 NLRB 745, 746 (1993)). This ignores the applicable pleading standard and the Board's qualification to its decision in *Kiro*, "[W]here the relevant facts are not in dispute, the Board may rule on the [] question without the need for a hearing." *Kiro, Inc*., 311 NLRB 745, 746 (1993). As repeatedly stated in the Respondent's Motion, "While AFC concedes it strongly disputes many of the facts alleged in the Consolidated Complaint, ***even accepting the facts as alleged***, AFC has not violated the Act." Resp. Mot. Sum. Judg. p. 9 (emphasis added). The foundational issue here is the Consolidated Complaint's reliance on conclusionary statements that "concerted activities" occurred, without reference to ***any*** facts that might support a finding that such activities actually occurred.

While the Acting General Counsel is permitted to rely on its factual allegations at this stage, it cannot rely on bald and unsupported legal conclusions. "The Board, like the federal courts, has adopted a system of notice pleading." *Smith Indus. Maint. Corp. d/b/a Quanta*, 355 N.L.R.B. No. 217 (2010). This pleading standard requires "more than labels and conclusions,

and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

The sole factual support for these claims of concerted activity is found in the Consolidated Complaint at paragraph 4. For brevity, Respondent will not restate its legal argument for why "expressing concerns to other employees about [a] supervisor having a discriminatory viewpoint" is not concerted activity as a matter of law.[3] Notably, the Acting General Counsel's Opposition does not attempt to dispute Respondent's argument that concerted activity did not occur. Instead, it simply restates the legal conclusion without authority or reference to any allegation in its pleading.

Each of the Acting General Counsel's alleged disputed facts concern Respondent's reaction to "concerted activities." AGC Opp'n p. 2. However, as submitted, neither the Consolidated Complaint nor the Acting General Counsel's Opposition allege any act that can be legally considered concerted activities. Therefore, any dispute about the reactions to that activity is irrelevant to the issue before the Board. Put plainly, while the parties dispute facts, those facts are not material unless concerted activity occurred. No such activity has occurred, and Respondent is entitled to summary judgment as a matter of law.

CONCLUSION

For all the above reasons, Respondent respectfully submits that the Consolidated Complaint should be dismissed as a matter of law or judgment is ordered in favor of AFC.

[*Signatures on following page.*]

[3] Respondent refers to and incorporates Section III(B) of its Motion in support of this argument.

Dated: February 16, 2021

Respectfully submitted,

/s/

David R. Warner, Esq.
Tyler J. Freiberger, Esq.
CENTRE LAW & CONSULTING, LLC
8330 Boone Blvd., Suite 300
Vienna, Virginia 22182
Tel: 703-288-2800
Fax: 703-288-4868
dwarner@centrelawgroup.com
tfreiberger@centrelawgroup.com

Counsel for Respondent AFC

CERTIFICATE OF SERVICE

I certify that on the 16th day of February 2021, a copy of the foregoing Motion to Dismiss or in the Alternative Motion for Summary Judgment was filed through the Agency's web portal with service to the parties as follows:

Via First Class Mail to:

Sarah Raybon
24038 North 40th Drive
Glendale, AZ 85310
Complainant

Katherine E. Leung
Counsel for the Acting General Counsel
NLRB Region 28,
421 Gold Avenue SW, Suite 310
Albuquerque, NM 87103
Counsel for the Agency
A courtesy copy of this Motion was provided via electronic mail to:
Katherine.Leung@nlrb.gov

/s/
Tyler J. Freiberger